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UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES BANKRUPTCY COURT

**EASTERN DISTRICT OF CALIFORNIA**

6 In re: ) Case No. 10-42050-D-7

7 VINCENT THAKUR SINGH and  
MALANIE GAY SINGH

Debtors.

10	MICHAEL F. BURKART, Chapter 7 Trustee,	)	Adv. Pro. No. 12-2312-D	
11		)	12-02312, 12-02320, 12-02368,	
12	Plaintiff,	)	12-02370, 12-02371, 12-02374,	
13	v.	)	12-02387, 12-02400, 12-02401,	
14	PADARATH BISESSAR	12-02312	)	12-02418, 12-02429, 12-02430,
15	PING ZOU	12-02320	)	12-02434, 12-02446, 12-02448,
16	SHIU PRASAD	12-02368	)	12-02461, 12-02469, 12-02478,
17	RIGOBERTO TORRES	12-02370	)	12-02483, 12-02486, 12-02496
18	XIAOYAN WU	12-02371	)	Docket Control No. KBP-5
19	ZHIBO WANG	12-02374	)	DATE: April 1, 2015
20	ASWEN SHARMA	12-02387	)	TIME: 10:30 a.m.
21	PARMILA PRASAD	12-02400	)	DEPT: D
22	VIMLA BISESSAR	12-02401	)	
23	ANN THACH	12-02418	)	
24	SONNY STEELE	12-02429	)	
25	JAMES SINGH	12-02430	)	
	RITA REDDY	12-02434	)	
	SHARON BELOLI	12-02446	)	
	ASHWINI SINGH	12-02448	)	
	SHAOHONG WENG	12-02461	)	
	CAROLYN ALLEN	12-02469	)	
	ROSEBEL SINGH	12-02478	)	
	SANDHYA NARAYAN	12-02483	)	
	SUSHILA PRASAD	12-02486	)	
	MARIA MORA	12-02496	)	
		)		
	Defendants.	)		

**MEMORANDUM DECISION**

27 This is the consolidated motion of the defendants in the  
28 above-captioned adversary proceedings (the "defendants") to

1 dismiss certain of the plaintiff's claims and for summary  
 2 judgment and partial adjudication. The plaintiff, who is the  
 3 trustee in the underlying chapter 7 case (the "trustee"), has  
 4 filed opposition, the defendants have filed a reply, the trustee  
 5 has filed a sur-reply, and the court has heard oral argument.  
 6 For the following reasons, the motion will be granted in part.

7 **I. Introduction**

8 First, the court would emphasize the large number of  
 9 adversary proceedings pending in this chapter 7 case, whereas  
 10 rather than moving the cases forward efficiently, both parties  
 11 have spent a substantial amount of time on issues that are  
 12 distracting, as well as those that are dispositive. Thus, for  
 13 example, both parties have focused extensively on whether the  
 14 defendants made "loans" to the debtor or "investments" with him.  
 15 The question seems important at first glance because under  
 16 California law, on which the trustee relies for his usury claims,  
 17 a return on an investment that was not in reality a "loan" cannot  
 18 be recovered as a payment of usurious interest,<sup>1</sup> and also because

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19  
 20 1. Numerous transactions involving the advance of money  
 21 are structured in some form other than a loan. In some  
 22 cases these ventures are actually investments and not  
 23 loans, in the sense that the investor expects a return  
 24 on the funds advanced but also risks a loss or receipt  
 of no return. In these cases the courts reject the  
 claim of usury even though the investor receives a  
 return on investment which exceeds the maximum usury  
 rate.

25 8 Miller & Starr, Cal. Real Estate (3d ed. 2001) § 21:3, pp.  
 26 20-21 (fn. omitted). This conclusion may be reached even in  
 27 cases where the transaction was documented by a promissory note  
 and thus, on its face, looked like a loan. See Wooton v.  
Coerber, 213 Cal. App. 2d 142, 146, 148 (1963); Giorgi v.  
Conradi, 199 Cal. App. 2d 82, 84-86 (1962); Atkinson v. Wilcken,  
 142 Cal. App. 2d 246, 247-48 (1956); Fitzgerald v. Provines, 102

1 under both state and federal bankruptcy fraudulent transfer law,  
2 a payment on an antecedent "debt" constitutes value for purposes  
3 of the reasonably equivalent value defense.<sup>2</sup>

4       However, the court need not decide whether the investments  
5 were loans or otherwise because, either way, (1) the fact of the  
6 debtor's creation and operation of a Ponzi scheme placed the  
7 debtor and by succession the trustee in the position of being in  
8 pari delicto -- "in equal fault" -- with the defendants, and in  
9 fact, at greater fault than the defendants, such that the law of  
10 in pari delicto precludes any recovery by the trustee on his  
11 usury claims, and (2) for each defendant who was an innocent  
12 investor (or "lender"), Ninth Circuit law precludes any recovery  
13 by the trustee on his constructive fraudulent transfer claims  
14 except to the extent the particular defendant received payments  
15 from the debtor totaling more than the total amount of the  
16 defendant's monies invested with (or "loaned to") the debtor.  
17 For the efficient administration of these proceedings, the court  
18 will attempt in these findings and conclusions to clear as much  
19 of the underbrush as possible.

20 **II. Motion to Dismiss Usury Claims -- Insufficiency of Pleadings**

21       As to the trustee's usury claims, the defendants contend the  
22 trustee's complaints fail to state a claim upon which relief can  
23 be granted. The argument is difficult to follow, but in any  
24 event, it does not hold up to scrutiny and, in addition, it comes  
25 too late. As the court understands the argument, the problem

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26  
27       Cal. App. 2d 529, 536-38 (1951).

28       2. Cal. Civ. Code § 3439.03; § 548(d)(2)(A) of the  
Bankruptcy Code.

1 comes from the trustee's use of the words "if," "any," and "to  
2 the extent that" in his usury allegations. For example, the  
3 first allegation in the usury claim is this:

4       *If Defendant asserts that some or all of the Payments  
5        were made pursuant to a loan or other type of borrowing  
6        arrangement between Vincent Singh and Defendant,  
7        Plaintiff alleges on information and belief that some  
8        or all of the Payments were for interest in excess of  
9        the statutory maximum of ten percent per annum, in a  
10       transaction where the loan and all interest thereon  
11       were absolutely repayable by Vincent Singh.*

12       First Amended Complaint, filed Aug. 15, 2012 ("Compl."), at 6:5-9  
13       (emphasis added).<sup>3</sup> The defendants conclude from the highlighted  
14       language that the complaints do not "contain any language  
15       alleging that there was a loan or other type of borrowing  
16       arrangement between Singh and any of [the] defendants."  
17       Defendants' Motion, filed Feb. 2, 2015 ("Mot."), at 7:6-7. In  
18       the defendants' view, this language

19       beg[s] the [following] question[]: 1. Has any  
20       Defendant asserted "that some or all of the Payments  
21       were made pursuant to a loan or other type of borrowing  
22       arrangement"? From the face of the Complaints, the  
23       answer is no. The usury claims are based on the  
24       premise that some defendants *may* assert a lending  
25       relationship, not that such a lending relationship  
26       exists. No such assertion that a lending relationship  
27       exists has been made.

28       *Id.* at 15:21-26.<sup>4</sup>

29       / / /

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30       3. Page and line citations are from the trustee's amended  
31       complaint in AP No. 12-2312. The same allegations appear in the  
32       original or amended complaints in the 20 other proceedings. (In  
33       some of the adversary proceedings, the trustee filed amended  
34       complaints; in others, he did not.)

35       4. Phrased another way, in the defendants' view, "[t]he  
36       Complaints merely speculate that a defendant might assert that  
37       there was a lending arrangement. No such assertion has been made  
38       in the Complaints, or otherwise." *Id.* at 12:15-16.

1       Similarly, the complaints allege that “[a]ny portion of the  
2 Payments which were for interest at a rate in excess of the  
3 statutory maximum was usurious under the laws of the state of  
4 California” (Compl. at 6:10-11, emphasis added by defendants),  
5 and from that language the defendants raise this question:

6       2. Was any portion of the Payments for interest? From  
7 the face of the Complaints, no such allegation has been  
8 made. The Complaints merely allege “Any portion of the  
Payments which were for interest at a rate in excess of  
the statutory maximum” was usurious. Was any portion  
9 of the Payments even for interest? The Complaints do  
not so allege, nor do they allege that, even if the  
Payments were for interest, that such Payments were for  
10 a “rate in excess of the statutory maximum.”

11 Mot. at 15:27-16:4. The defendants conclude that

12       it is impossible to discern from a reading of the  
13 Complaints exactly, or even generally, what the Trustee  
14 is trying to recover. In fact, the Complaints  
themselves even appear quite uncertain on their face.  
15 The uncertain language leaves the Defendants  
questioning whether the usury claim even has anything  
to do with them individually.

16 Id. at 14:28-15:4.

17       Although the use of the words “if,” “any,” and “to the  
18 extent that” theoretically lends a certain speculative quality to  
19 the allegations, the court does not agree that the language left  
20 the defendants in any doubt as to what the trustee was alleging  
21 or what he was seeking to recover. And even if the language did  
22 create doubt, the defendants had the opportunity to seek a more  
23 definite statement two and one-half years ago, before they filed  
24 their answers to the complaints.<sup>5</sup> They did not do so. Instead,

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25  
26       5. “A party may move for a more definite statement of a  
27 pleading to which a responsive pleading is allowed but which is  
28 so vague or ambiguous that the party cannot reasonably prepare a  
response. The motion must be made before filing a responsive  
pleading . . . .” Fed. R. Civ. P. 12(e), incorporated herein by  
Fed. R. Bankr. P. 7012(b).

1 the defendants, except one, answered each paragraph of the  
2 trustee's usury allegations separately. (Defendant Carolyn  
3 Allen, in AP No. 12-2469, filed a pro se general denial.) The  
4 court concludes that the "if," "any," and "to the extent that"  
5 language did not leave the defendants in any doubt that the  
6 trustee would be seeking to recover payments made by the debtor  
7 to the defendants as payments of usurious interest.

8 Also as part of this argument, the defendants cite certain  
9 documents the trustee served on the defendants' counsel in  
10 November and December of 2014 pursuant to the court's order  
11 establishing procedures for the amendment of complaints. That  
12 order permitted the trustee, in lieu of filing amended  
13 complaints, to provide only revised paragraphs containing  
14 changes. The trustee provided revised paragraphs in 18 of the  
15 adversary proceedings, under cover of a caption page with a title  
16 beginning "Excerpts," for example, "Excerpts from Amended  
17 Complaint for Avoidance and Recovery of Fraudulent Transfer;  
18 Recovery of Usurious Interest; Objection to Claim." In 11 of  
19 those adversary proceedings, the title of the Excerpts did not  
20 include the words "Recovery of Usurious Interest," which had been  
21 included in the titles of the original or earlier amended  
22 complaints in those proceedings. From that fact, the defendants  
23 in those 11 proceedings conclude, and seek an order confirming,  
24 that "no usury claims are included in the amended complaints  
25 against them." Mot. at 17:7-8.

26 The argument is frivolous. The court's order permitted the  
27 trustee to provide to the defendants' counsel, in lieu of amended  
28 complaints, only revised paragraphs containing the changes the

1 trustee would make if filing amended complaints. It was clear  
2 from the order that those portions of the original and earlier  
3 amended complaints not included with the revised paragraphs were  
4 not to be seen as deleted from the complaints, as the defendants  
5 now suggest. And although the trustee offers no explanation for  
6 the discrepancies among the titles of the various excerpts, there  
7 is no reason to conclude they were anything but accidental.  
8 Indeed, the trustee included the prayer in his excerpts, and in  
9 every instance where the title omitted the reference to Recovery  
10 of Usurious Interest, the prayer included a request for the  
11 recovery of usurious interest payments and treble damages.

12 **III. Motion to Dismiss Usury Claims -- Judicial Estoppel**

13 The defendants contend the trustee's usury claims must be  
14 dismissed because they inherently conflict with his claim that  
15 the debtor was running a Ponzi scheme. They argue that because  
16 the trustee caused the court to rely on his Ponzi scheme theory  
17 when it granted his motions for default judgments in related  
18 adversary proceedings and his motions for leave to amend his  
19 complaints, the trustee is judicially estopped from claiming that  
20 the debtor was not running a Ponzi scheme and judicially estopped  
21 from arguing that the defendants were not investors in that  
22 scheme. The defendants frame their argument as follows:

23 By pursuing usury theories in the face of the otherwise  
24 firmly established Ponzi scheme position that the  
25 Trustee has taken, the Trustee will, in litigating a  
26 usury claim, necessarily have to take a position that  
27 is totally inconsistent with his prior position. The  
28 Trustee has obtained judicial relief based on the  
allegation that this was a Ponzi scheme and that the  
Defendants were investors. A usury claim is based on a  
lending relationship, not an investor relationship. A  
usury claim assumes that the Defendants, whom the  
Trustee has labeled "investors" in every other

1       pleading, suddenly become "lenders" when demanding  
2       usurious interest.

3 Mot. at 18:19-25.

4       The court rejects the argument. It is essential to the  
5 application of judicial estoppel that the party to be estopped --  
6 here, the trustee -- must have asserted inconsistent positions.  
7 "[A] party's later position must be 'clearly inconsistent' with  
8 its earlier position." New Hampshire v. Maine, 532 U.S. 742, 750  
9 (2001). Here, the court is not persuaded that a usury claim is  
10 inconsistent with a Ponzi scheme, that a "lending relationship"  
11 is inconsistent with an "investor relationship," or that being an  
12 "investor" is inconsistent with being a "lender."

13       The defendants cite no authority for their assumption that a  
14 Ponzi scheme cannot be based on a lending relationship, and there  
15 is authority to the contrary. For example, in United States v.  
16 Treadwell, 593 F.3d 990 (9th Cir. 2010), the Ninth Circuit  
17 affirmed the criminal convictions of three operators of "a  
18 massive four-year Ponzi scheme in which more than 1,700 investors  
19 across the United States lost over \$40 million." 593 F.3d at  
20 992. Although the court repeatedly characterized the victims as  
21 "investors," the evidence was that they had "loaned" money to the  
22 perpetrators. Id. at 993. The court referred to the  
23 perpetrators as having told investors "the loans were 'zero  
24 risk,' often paying returns of 50% interest per month and 2%  
25 interest compounded monthly" (id.), and referred to the  
26 "investors" as having "'loaned' over \$50 million to the  
27 defendants' companies." Id. at 994. The court repeatedly and  
28 unequivocally characterized the operation as a Ponzi scheme

1 despite the fact that the "investments" were in the form of  
 2 "loans."

3 Similarly, in United States v. Sine, 493 F.3d 1021 (9th Cir.  
 4 2007), the Ninth Circuit affirmed the conviction and sentencing  
 5 of a lawyer who helped run what the Ninth Circuit characterized  
 6 as a "pyramid scheme." 493 F.3d at 1023. The court  
 7 characterized the victims as "lending money" to the perpetrators,  
 8 and the funds received by the perpetrators as "loans" for which  
 9 the "lenders" received promissory notes and were promised between  
 10 20% and 100% interest. See id. at 1024. "In fact, the money  
 11 provided by these 'lenders' funded no legitimate projects.  
 12 Instead, some of the money went to repay earlier 'lenders' so  
 13 that the pyramid scheme could continue, and some ended up in the  
 14 personal coffers of [the perpetrators]." Id.

15 In another example, Auza v. United Dev., Inc. (In re United  
 16 Dev., Inc.), 2007 Bankr. LEXIS 4857 (9th Cir. BAP 2007), the  
 17 Bankruptcy Appellate Panel found that the debtor was operating a  
 18 Ponzi scheme (at \*29) in circumstances where

19 [the debtor] could not keep up with its loan payments  
 20 to [an original lender] and others like him, which  
 21 resulted in borrowing additional funds from existing  
 22 and new investors to repay previous loans. As a result  
 23 of UDI's insufficient assets or profits generated from  
 its business activities from which to repay its  
lenders, UDI used the funds obtained from later lenders  
 to repay the principal and above-market rates of return  
 to earlier investors.

24 Id. at \*2-3 (emphasis added). There was no indication in the  
 25 decision that the "investors" were anything other than lenders.

26 The court concludes from these decisions that the trustee's  
 27 usury claims are not inconsistent with his position that the  
 28 debtor was operating a Ponzi scheme, and therefore, that the

1 trustee is not judicially estopped from asserting the usury  
 2 claims. As discussed below, however, this does not mean the  
 3 usury claims hold up as against the defendants' in pari delicto  
 4 defense.

5 **IV. Motion to Dismiss / for Summary Judgment on Usury Claims --**  
 6 **In Pari Delicto / Estoppel / Unclean Hands**

7 The trustee does not dispute the underlying premise of the  
 8 defendants' in pari delicto argument, which is that if the debtor  
 9 would have been barred by the doctrine of in pari delicto from  
 10 recovering the allegedly usurious interest he paid the defendants  
 11 (if any), then the trustee is also barred.<sup>6</sup> What he does dispute  
 12 is that the issue can be resolved in advance of trial. The court  
 13 finds that the issue is subject to decision on a motion to  
 14 dismiss or a motion for summary judgment. The court also finds  
 15 that the defendants have made a *prima facie* showing that the  
 16 defense of in pari delicto applies, and the trustee has failed to  
 17

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18 6. A bankruptcy trustee has the power to pursue, in  
 19 general, two types of actions -- actions brought pursuant to his  
 20 avoiding powers and actions based on the debtor's pre-petition  
 21 rights of action that become property of the estate upon the  
 22 filing of the case. See Official Comm. of Unsecured Creditors v.  
R.F. Lafferty & Co., 267 F.3d 340, 356 (3rd Cir. 2001). As to  
 23 the latter, the trustee steps into the shoes of the debtor,  
 24 taking such rights of action subject to any defenses a defendant  
 25 would have had against the debtor, including in pari delicto.  
Grayson Consulting, Inc. v. Wachovia Sec., Inc. (In re Derivium  
Capital LLC), 716 F.3d 355, 367 (4th Cir. 2013); Official Comm.  
of Unsecured Creditors of PSA, Inc. v. Edwards, 437 F.3d 1145,  
 26 1150 (11th Cir. 2006); R.F. Lafferty & Co., 267 F.3d at 356;  
Sender v. Buchanan (In re Hedged-Investments Assocs.), 84 F.3d  
 27 1281, 1285 (10th Cir. 1996). See also In re Bonham Recovery  
Actions, 229 B.R. 438, 442 (Bankr. D. Alaska 1999) (citations  
 28 omitted) ["A bankruptcy trustee has long been able to assert a  
 right to a usury claim which belonged to a debtor. The trustee,  
 however, takes the property of the estate under 11 USC § 541(a)  
 subject to any encumbrances or blemishes that existed against the  
 debtor. . . . In the bankruptcy vernacular, the trustee stands  
 in the shoes of the debtor."].

1 show there is a genuine issue of material fact that should  
2 preclude summary adjudication of the issue.

3 The court will begin with the sometimes conflicting policies  
4 underlying California's usury law and the doctrine of *in pari*  
5 *delicto*. The purpose of the usury law is "to protect the  
6 necessitous, impecunious borrower who is unable to acquire credit  
7 from the usual sources and is forced by his economic  
8 circumstances to resort to excessively costly funds to meet his  
9 financial needs." Ghirardo v. Antonioli, 8 Cal. 4th 791, 804-05  
10 (1994). "The usury laws were enacted primarily to 'protect the  
11 indigent, who are helpless to protect themselves in a practical  
12 sense . . . .'" O'Connor v. Televideo Sys., 218 Cal. App. 3d  
13 709, 718 (1990) (citation omitted). Thus, the policy underlying  
14 the usury law is the protection of the borrower, and in  
15 particular, of the impecunious and helpless borrower.

16 The doctrine of *in pari delicto* derives from the principle  
17 that the court is not to aid either party to an illegal contract.

18 It is well established that no recovery can be had by  
19 either party to a contract having for its object the  
20 violation of law. The courts refuse to aid either  
21 party, not out of regard for his adversary but because  
of public policy. Where it appears that a contract has  
for its object the violation of law, the court should  
sua sponte deny any relief to either party.

22 Smith v. California Thorn Cordage, Inc., 129 Cal. App. 93, 99-100  
23 (1933) (citation omitted, internal quotation marks omitted,  
24 emphasis omitted). The Latin "*in pari delicto*" means "in equal  
25 fault"; that is, parties who are *in pari delicto* are equally at  
26 fault. Kelly v. First Astri Corp., 72 Cal. App. 4th 462, 467 n.4  
27 (1999). In such a situation, the courts will leave the parties  
28 as they find them, and will not award a recovery to either party.

1 Id. at 481 [on application of doctrine to illegal gambling  
2 contracts].

3 There is no doubt that the general rule requires the  
4 courts to withhold relief under the terms of an illegal  
5 contract or agreement which is violative of public  
6 policy. It is also true that . . . "when the evidence  
7 shows that . . . [a party] in substance seeks to  
8 enforce an illegal contract or recover compensation for  
9 an illegal act, the court has both the power and duty  
10 to ascertain the true facts in order that it may not  
11 unwittingly lend its assistance to the consummation or  
12 encouragement of what public policy forbids." These  
13 rules are intended to prevent the guilty party from  
14 reaping the benefit of his wrongful conduct, or to  
15 protect the public from the future consequences of an  
16 illegal contract.

17 Jacobs v. Universal Dev. Corp., 53 Cal. App. 4th 692, 700 (1997),  
18 quoting Tri-Q, Inc. v. Sta-Hi Corp., 63 Cal. 2d 199, 218 (1965).  
19 Thus, whereas the usury law is generally intended for the  
20 protection of the borrower, the policy underlying the *in pari  
21 delicto* doctrine may favor the lender, and the usury law and the  
22 *in pari delicto* doctrine may come into conflict.

23 The trustee's theory is that California's usury law requires  
24 the defendants, as lenders who loaned money to the debtor, to  
25 repay to the estate the payments they received from the debtor,  
26 which the trustee claims were usurious interest payments, plus  
27 treble damages, as allowed under California's usury law. This  
28 theory relies on the policy of protection of the borrower -- the  
policy underlying the usury law. The defendants, on the other  
hand, contend their borrower, debtor Vincent Singh, was "*in pari  
delicto*" with the defendants; that is, of equal (or greater)  
fault in entering into the contracts the trustee claims called  
for illegal usurious interest, and thus, that the trustee,  
standing in the shoes of the debtor, should not be able to

1 recover the payments (assuming he can establish they were made on  
2 account of interest). In contrast with the policy underlying the  
3 usury law, the in pari delicto defense in this situation would  
4 favor the lenders; that is, the defendants.

5 In apparent recognition of this policy conflict, earlier  
6 California cases stated that the doctrine of in pari delicto does  
7 not apply to usury claims. For example, the trustee cites  
8 Westman v. Dye, 214 Cal. 28 (1931), in which the court stated  
9 that "under the Usury Law of this state the parties to a usurious  
10 transaction are not regarded as in pari delicto." 214 Cal. at  
11 35; see also cases collected in Buck v. Dahlgren, 23 Cal. App. 3d  
12 779, 787 (1972). The problem with the trustee's reliance on  
13 Westman is that application of in pari delicto in that case would  
14 have meant penalizing a borrower who had done nothing more  
15 egregious than making the usurious interest payments voluntarily.

16 Previous cases under the particular constitutional provision  
17 the court was construing had held that voluntary payments of  
18 interest, even if made under a mistake of law, operated as a  
19 waiver of the borrower's right to recover payments of usurious  
20 interest or to have them applied to the principal balance of the  
21 loan. See Westman, 214 Cal. at 32. The Westman court rejected  
22 those cases, deciding instead it should follow cases in other  
23 jurisdictions "if the same appear equitable and right." Id. at  
24 37. Thus, the court adopted a "rule allowing payments of  
25 usurious interest to be set off against the principal debt in  
26 actions brought to collect the latter." Id. at 36. Application  
27 of in pari delicto in that case would have prevented the borrower  
28 from having his usurious interest payments applied to the

1 principal balance simply because he had paid them voluntarily.  
2 It might be said that, as applied to the facts of that case, the  
3 policy underlying the usury law -- protection of the borrower --  
4 outweighed the policy underlying the *in pari delicto* doctrine --  
5 not assisting either party to an illegal contract.

6 The court finds that the Westman case, including the  
7 statement that "the parties to a usurious transaction are not  
8 regarded as *in pari delicto*," should have little, if any, bearing  
9 on the present case, involving as it does a borrower who did far  
10 more than simply paying usurious interest voluntarily. Here, the  
11 borrower, Vincent Singh, as mastermind of the Ponzi scheme,  
12 solicited the loans and offered allegedly usurious interest on  
13 them as an integral part of the Ponzi scheme. More on point here  
14 is Buck v. Dahlgren, 23 Cal. App. 3d 779 (1972), cited by the  
15 defendants, in which the court did apply *in pari delicto* to a  
16 usury claim.<sup>7</sup> In that case, an experienced real estate developer  
17 advertised for a loan, and a Swedish immigrant with no experience  
18 in real estate lending responded and agreed to make the loan.  
19 The developer/borrower later sued the lender to recover the  
20 usurious interest the developer/borrower had paid. The court  
21

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22 7. The court quoted and relied on language in a New Jersey  
23 case (see below) that used the phrase "in pari delicto"  
24 specifically (see Buck, 23 Cal. App. 3d at 791), but the Buck  
25 court cast its actual holding in terms of estoppel. "The  
particular and unusual equities of this case impel us to the  
conviction that the philosophy expressed by Ryan [discussing *in  
pari delicto*] is most appropriately invoked here. Accordingly,  
we conclude the trial court properly found appellant was estopped  
from claiming the loans from respondent were usurious." Id.  
This court believes the two doctrines -- *in pari delicto* and  
estoppel -- as applied to the defense of a usury claim, are one  
and the same. Neither party has suggested they should be  
distinguished from one another.

1 canvassed the California cases, including Westman, observing that  
 2 they had focused on furthering the goal of the usury law, that  
 3 being "to penalize lenders taking advantage of unwary and  
 4 necessitous borrowers." 23 Cal. App. 3d at 787. In furtherance  
 5 of this policy of protection, the court said,

6 the courts have . . . regularly held a borrower and a  
 7 lender are not in pari delicto in a usurious  
 8 transaction and the lender may not assert an estoppel  
 9 against the borrower simply because the borrower took  
 the initiative in seeking the loan, knew of the  
 usurious nature of the transaction, and paid usurious  
 interest without protest.

10 Id. citing Westman among others.

11 The Buck court contrasted those cases with the facts before  
 12 it, observing that the developer/borrower had solicited the  
 13 loans, suggested and initiated the usurious terms, induced  
 14 additional loans by misrepresenting his intention of repaying  
 15 them, and concealed the true value of the land he put up as  
 16 collateral. The court found that

17 [a]t a minimum, the case before us is distinguishable  
 18 from the foregoing cases on the basis of the fraudulent  
 19 practices of the borrower, and on the extent of the  
 20 involvement of [the borrower] in carrying out the  
 entire scheme, as well as on the resulting substantial  
 loss to the lender. [The borrower] now seeks not only  
 to retain the results of his fraud but also to mulct  
 [the lender] further.

21  
 22 Buck, 23 Cal. App. 3d at 790. Rejecting such an outcome, the  
 23 court held the developer/borrower was estopped from recovering  
 24 the usurious interest. Id. The Buck court cited Heald v.  
Friishansen, 52 Cal. 2d 834, 837 (1959), in which the court  
 25 stated that "In the absence of fraud by the borrower, the  
 26 parties to a usurious transaction are not in pari delicto . . .,"  
 27 and Stock v. Meek, 35 Cal. 2d 809, 817 (1950), stating that "[i]f

1 no loophole is provided for lenders, and all borrowers save  
 2 fraudulent ones are protected, usurious transactions will be  
 3 discouraged." Buck, 23 Cal. App. 3d at 788.

4 The Buck court also quoted from and relied on Ryan v. Motor  
 5 Credit Co., 130 N.J. Eq. 531, 559, 23 A.2d 607, 623 (1941), and  
 6 in particular, the following:

7 It is true that the penalties of the [usury] act seem  
 8 to be directed solely to the lender, and the advantages  
 9 or benefits . . . reserved solely for the borrowers.  
 10 But these penalties were designed to prevent oppression  
 11 of the weak and poor; they were not designed as rewards  
 12 for the perfidy of the borrower. Where no oppression  
 13 is involved, no advantage taken by the lender of the  
 14 borrower, the transaction being entered into with the  
 15 deliberate purpose of defeating the [usury] statute,  
 16 the parties are both particeps criminis and in pari  
 17 delicto, and the rule and not the exception applies.  
 18 Certainly it was not the intention of the legislature  
 19 to preclude the courts, in such cases, from finding as  
 20 a fact that the parties were in pari delicto.

21 Buck, 23 Cal. App. 3d at 790-91, quoting Ryan, 130 N.J. Eq. at  
 22 559, 23 A.2d at 623. The Buck court also found the facts of the  
 23 Ryan case to be significant. The case concerned a New Jersey law  
 24 limiting the amount any one person could owe to a small loan  
 25 company and limiting the interest rate on such loans. In order  
 26 to circumvent the statute, the borrower, a car dealer, and the  
 27 lender, a credit company, entered into an arrangement where the  
 28 borrower obtained loans in the names of nominees, relatives, and  
 friends, and in names "selected at random from telephone  
 directories, from tombstones or taken from the thin air." 130  
 N.J. Eq. at 534, 23 A.2d at 611. In those circumstances, the  
 court found, the borrower was not among the class of borrowers  
 the usury laws are intended to protect, being "not under pressure  
 of want or necessity" and "not susceptible to oppression," but

1 instead "criminally minded." 130 N.J. Eq. at 558, 23 A.2d at  
2 623. The court denied the borrower's bill for recovery of the  
3 usurious interest he had paid (130 N.J. Eq. at 563, 23 A.2d at  
4 625), and also denied the lender's counterclaim for the remaining  
5 balance due on the loans. Id.

6 In the present case, the debtor, Vincent Singh, has pled  
7 guilty in federal court to wire fraud in connection with his  
8 operation of the Ponzi scheme.<sup>8</sup> The court takes judicial notice  
9 of the debtor's plea agreement, in which the debtor admitted he  
10 solicited investors by telling them their money would be used to  
11 make safe loans for a high rate of return; that he did not use  
12 all investor money in the way he had told investors he would;  
13 that he made millions of dollars worth of payments to investors  
14 to make it appear his business was successful in the way he had  
15 described to investors, so as to induce them to give him even  
16 more money; that when he made those payments to investors, he was  
17 generally using investors' principal; that the appearance of a  
18 successful business was false; that his false statements  
19 convinced the investors to invest with him; and that he did not  
20 use investor money to make hard money loans, but instead used  
21 investor money to pay other investors. See Ex. A to Plea  
22 Agreement in United States v. Singh, Case No. 2:12-CR-352 (E.D.  
23 Cal.), filed March 20, 2014.

24 In these circumstances, the court has no trouble concluding  
25 that the policy underlying the usury law; namely, the protection  
26

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27 8. The court will discuss below the admissibility and  
28 effect of a guilty plea and plea agreement in a Ponzi scheme  
case.

1 of the needy and unwary borrower, does not apply to the debtor,  
2 and that the policies supporting the in pari delicto doctrine do  
3 apply to his transactions with investors, such that the debtor  
4 would be barred by in pari delicto from recovering the allegedly  
5 usurious interest payments, if any, if he tried to recover them.  
6 Thus, the trustee, as successor to the debtor's interests in the  
7 usury claims, and subject to all of the defenses the defendants  
8 would have against the debtor, is also barred.

9 A California court has fairly recently applied the doctrine  
10 of in pari delicto to bar recovery by a bankruptcy trustee in a  
11 Ponzi scheme case. In Peregrine Funding, Inc. v. Sheppard Mullin  
12 Richter & Hampton LLP, 133 Cal. App. 4th 658, 679-82 (2005), the  
13 court held that the bankruptcy trustee of an entity ("Peregrine")  
14 used by its owner ("Hillman") to perpetrate a Ponzi scheme was  
15 barred by the doctrine of unclean hands (which the court  
16 expressly equated to the doctrine of in pari delicto (133 Cal.  
17 App.4th at 677)) from suing the debtor's and its owner's  
18 attorneys ("Sheppard") for negligence and misconduct that  
19 allegedly aided in delaying discovery of the scheme.

20 The court first found that the doctrine applied as against  
21 the trustee because he had succeeded to pre-petition claims of  
22 the debtor subject to any defenses that might have been asserted  
23 against the debtor. Id. at 680. "In the context of an unclean  
24 hands defense, this means a bankruptcy trustee stands in the  
25 shoes of the debtor and may not use his status as an innocent  
26 successor to insulate the debtor from the consequences of its  
27 wrongdoing." Id. The court went on to hold that the attorneys  
28 would have prevailed on an unclean hands defense against the

1 debtor, and thus, they prevailed against the trustee.

2 In this case, Peregrine and Hillman's orchestration of  
 3 the Ponzi scheme that defrauded investors is intimately  
 4 related to the professional malpractice claims before  
 5 the court. These claims are based entirely on the  
 6 assertion that Sheppard's professional advice and  
 7 tactics enabled Hillman and Peregrine to perpetuate  
 8 their fraud on investors. Moreover, Peregrine's  
 9 participation in the fraud affects the equities between  
 10 itself and Sheppard. For Peregrine—the company  
 11 plaintiffs allege was controlled by Hillman and used by  
 12 him to operate the Ponzi scheme—to now complain of  
 13 Sheppard's role in enabling it to commit the fraud is  
 14 unfair, and it is precisely this sort of unfairness the  
 15 unclean hands doctrine seeks to address.

16 Id. at 681.

17 Also recently, a California court applied the doctrine of  
 18 unclean hands to require a criminal defendant, as part of a  
 19 restitution award to his victim, to pay pre-judgment interest (at  
 20 a non-usurious rate) as a component of his victim's economic loss  
 21 despite the fact that the promissory notes documenting the  
 22 victim's loans to the defendant called for interest at usurious  
 23 rates. People v. Wickham, 222 Cal. App. 4th 232, 237 (2013).  
 24 The defendant/borrower relied on a civil case, Rochester Capital  
 25 Leasing Corp. v. K & L Litho Corp., 13 Cal. App. 3d 697, 703  
 26 (1970), which held that the lender in a usurious transaction may  
 27 recover his principal but may recover no interest at all. The  
 28 Wickham court, in essence, viewed the doctrine of unclean hands  
 as prevailing over the purpose of the usury laws, when applied to  
 the facts before it.

29 The purpose of the usury laws is to protect the  
 30 necessitous, improvident borrower who is unable to  
 31 acquire credit from the usual sources and is forced by  
 32 his economic circumstances to resort to excessively  
 33 costly funds to meet his financial needs. . . . Here,  
 34 defendant was not a poor, needy borrower who had no  
 35 choice but to borrow money from Mr. Griffin to meet his

1 financial needs. Rather, defendant told Mr. Griffin  
 2 that he borrowed some of the money to invest in Mexican  
 3 gold and "lumber deals," not to buy food or pay rent.  
 4 Further, the record shows that defendant did not intend  
 5 the transactions as loans secured by his enforceable  
 6 promise to repay, but rather as a means to obtain money  
 7 from Mr. Griffin under false pretenses. Defendant had  
 8 a history of fraud and theft-related convictions for  
 9 amounts more than \$100,000 and, in fact, pled guilty to  
 10 obtaining money from Mr. Griffin by false pretenses.  
 11

12 Wickham, 222 Cal. App. 4th at 237-38. "The doctrine of unclean  
 13 hands prevents a party from obtaining either legal or equitable  
 14 relief when that party has acted inequitably or with bad faith  
 15 relative to the matter for which relief is sought." Id. at 238.  
 16 The court found the case before it to be a "textbook case" for  
 17 application of the doctrine. Id. This court finds the present  
 18 case, in light of the debtor/borrower's operation of a Ponzi  
 19 scheme, to also be a textbook case.

20 The trustee makes three arguments that, in light of the  
 21 debtor's guilty plea and plea agreement, are unpersuasive.  
 22 First, he claims the defendants "have presented no evidence on  
 23 the subject of whether Vincent Singh was in pari delicto with the  
 24 Moving Defendants." Trustee's Opposition, filed Feb. 18, 2015  
 25 ("Opp."), at 40:26-27. Ordinarily, of course, a party moving for  
 26 summary judgment will present supporting evidence; here, the  
 27 defendants submitted no evidence for their in pari delicto  
 28 argument. However, the court may consider not only materials  
 29 cited by the moving party but other materials in the record.  
 Fed. R. Civ. P. 56(c)(3), incorporated herein by Fed. R. Bankr.  
 P. 7056.

In Santa Barbara Capital Mgmt. v. Neilson (In re Slatkin),  
 525 F.3d 805, 812 (9th Cir. 2008), the court found a debtor's

1 plea agreement, in circumstances substantially similar to those  
 2 in this case, to be admissible evidence, under Fed. R. Evid.  
 3 807(a)(1), of his operation of a Ponzi scheme with the actual  
 4 intent to defraud. Further, the court held that

5 a debtor's admission, through guilty pleas and a plea  
 6 agreement admissible under the Federal Rules of  
 7 Evidence, that he operated a Ponzi scheme with the  
 8 actual intent to defraud his creditors conclusively  
 9 establishes the debtor's fraudulent intent under 11  
 U.S.C. § 548(a)(1)(A) and California Civil Code §  
 3439.04(a)(1), and precludes relitigation of that  
 issue.

10 Id. at 814. See also AFI Holding, Inc. v. Mackenzie, 525 F.3d  
 11 700, 704 (9th Cir. 2008) ["Eisenberg's plea demonstrates the  
 12 existence of fraudulent intent and a Ponzi scheme"]; La Bella v.  
 13 Bains, 2012 U.S. Dist. LEXIS 76502, \*10-12, 2012 WL 1976972, \*4  
 14 (S.D. Cal. 2012) [taking judicial notice of plea agreement to  
 15 establish actual intent to defraud in a Ponzi scheme].

16 In this case, the parties have previously made the court  
 17 aware of debtor Vincent Singh's guilty plea and plea agreement,  
 18 and the court finds it appropriate to take judicial notice of  
 19 them in connection with the trustee's usury claims, for purposes  
 20 of evaluating the defendants' *in pari delicto* defense. Not only  
 21 are the guilty plea and plea agreement matters of which the court  
 22 can and does take judicial notice but the trustee himself has  
 23 submitted a declaration of an expert he has retained, who  
 24 testifies to the following opinion:

25 Vincent Singh was operating a Ponzi scheme from 2005 or  
 26 2006 until he filed his Chapter 7 petition in August  
 27 2010. All payments from and to investors during that  
 period which were for "investment" purposes were  
 payments in furtherance of the Ponzi scheme.

28 / / /

1 G. McHale Decl., filed Feb. 18, 2015 ("McHale Decl."), at 2:23-  
2 26.

3 In both an action to recover a fraudulent transfer based on  
4 actual intent to defraud and in an action to recover usurious  
5 interest, in which the borrower is alleged to have acted  
6 fraudulently, the fact of the debtor/borrower's operation of a  
7 Ponzi scheme is highly relevant and probative. Indeed, "the mere  
8 existence of a Ponzi scheme is sufficient to establish actual  
9 intent to defraud." Donell v. Kowell, 533 F.3d 762, 770 (9th  
10 Cir. 2008); AFI Holding, 525 F.3d at 704. Simply put, the  
11 debtor's guilty plea and plea agreement are evidence of conduct  
12 by the debtor that took him completely outside the class of  
13 borrowers the usury laws are meant to protect such that he would  
14 clearly be estopped to recover from the defendants. The trustee,  
15 by succession to the debtor's claims, is also estopped. The  
16 trustee's expert's declaration also supports this conclusion.

17 Second, and related to his first argument, the trustee  
18 contends the validity of an in pari delicto defense should not be  
19 decided at the pleading stage. Thus, he states:

20 [W]hile it might be possible to conclude that the  
21 parties to a usurious transaction are in pari delicto,  
22 any decision to bar a usury claim would depend on the  
facts. It does not happen as a matter of law. The  
bottom line is that, like any other factual defense, it  
must be resolved on a factual basis.

23  
24 Opp. at 41:22-24. Again, the trustee misses the point that there  
25 is evidence of the existence of a Ponzi scheme, in the form of  
26 the debtor's guilty plea and plea agreement, which the trustee  
27 has not refuted. Indeed, the trustee himself has asserted in his  
28 complaints that the debtor was running a Ponzi scheme, and has

1 offered expert testimony to that effect.

2 In Terlecky v. Hurd (In re Dublin Sec.), 133 F.3d 377 (6th  
3 Cir. 1997), the bankruptcy trustee opposed a motion to dismiss  
4 his complaint on the ground that the *in pari delicto* defense  
5 required a more intensive fact-finding effort. The court  
6 affirmed the district court's granting of the motion, noting that  
7 the trustee had admitted in his complaint that

8 the debtors' own actions were instrumental in  
9 perpetrating the fraud on the individuals choosing to  
10 invest in the Dublin Securities schemes. [The trustee]  
11 concedes, for example, that the debtors intentionally  
defrauded their investors. Such purposeful conduct  
thus establishes conclusively that the debtors were at  
least as culpable as the defendants in this matter.

12 133 F.3d at 380.<sup>9</sup>

13 The trustee cites Fed. R. Civ. P. 8(d), arguing he is  
14 entitled to assert inconsistent theories of the case, one of  
15 which is that the debtor was running a Ponzi scheme and the  
16 other, that the defendants made usurious loans to the debtor.  
17 (As discussed above, the court does not find these theories to be  
18 inconsistent.) The problem is that Rule 8 states the general  
19 rules for pleading, whereas the defendants' motion is one to  
20 dismiss the case for failure to state a claim, but also for  
21 summary judgment or summary adjudication of issues. There being  
22 conclusive evidence that the debtor was running a Ponzi scheme  
23 with the actual intent to defraud, it was incumbent on the

24 \_\_\_\_\_  
25 9. And in Peregrine Funding, the court stated that  
26 "[a]lthough plaintiffs are correct that application of this  
27 defense generally rests on questions of fact, this does not mean  
28 the defense can never prevail at the pleading stage or on a  
motion to strike. Where, as here, a plaintiff's own pleadings  
contain admissions that establish the basis of an unclean hands  
defense, the defense may be applied without a further evidentiary  
hearing." 133 Cal. App. 4th at 681 (citation omitted).

1 trustee to come forward with affirmative evidence to show the  
2 existence of genuine issues of fact for trial. Anderson v.  
3 Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986). As regards the  
4 defendants' in pari delicto defense, he has not done so.

5 Finally, the trustee has suggested the defendants were part  
6 of a conspiracy with the debtor to evade taxes and thereby to  
7 defraud the IRS. Thus, he argues:

8 One final reason to deny the Moving Parties' in pari delicto defense at this stage is the question of how to deal with the fact that the Moving Parties may themselves have unclean hands. The evidence at trial may show that Vincent Singh was engaged in a Ponzi scheme, but what if the Moving Parties were complicit with Vincent Singh in a scheme to defraud the IRS? Should they be estopped to raise the "in pari delicto" defense? This issue is not presently before the Court, and Plaintiff will not attempt to suggest a resolution.

15 Opp. at 42:7-12. The court believes the issue is before the court. The defendants raised a legitimate in pari delicto defense in their motion, and the debtor's guilty plea and plea agreement demonstrate the applicability of the defense. Thus, the trustee had the burden to demonstrate the existence of genuine issues of fact for trial concerning the defense.

21 The trustee claims it is undisputed that the defendants did not pay taxes on the payments they received from the debtor, failed to keep records of those payments, and claim not to know how the amounts of the payments were calculated. He also claims the debtor did not file 1099's showing the payment of interest and did not provide statements of amounts invested, amounts earned, amounts paid, or amounts due. Thus, the trustee concludes, "[e]verything was designed to fly under the radar of

1 the IRS, so that interest payments received by the Moving  
 2 Defendants would not be taxed." Opp. at 19:14-16. He  
 3 acknowledges that his evidence is "completely circumstantial"  
 4 (id. at 19:9), but cites case law suggesting a conspiracy may be  
 5 proven by circumstantial evidence and inferences.

6 The trustee has submitted no evidence, and has not even  
 7 suggested, that the payments the defendants received from the  
 8 debtor were taxable. The defendants claim they were not, and the  
 9 court, of course, has no knowledge or understanding on this issue  
 10 one way or the other. However, it was up to the trustee to  
 11 present his evidence in response to the motion, and he has failed  
 12 to do so. "A scintilla of evidence or evidence that is merely  
 13 colorable or not significantly probative does not present a  
 14 genuine issue of material fact." United Steel Workers of America  
 15 v. Phelps Dodge Corp., 865 F.2d 1539, 1542 (9th Cir. 1989).  
 16 Discovery in these adversary proceedings has closed after two and  
 17 one-half years; thus, the trustee would be hard-pressed to argue  
 18 he needs more time to develop his evidence.<sup>10</sup>

19 Further, even evidence that the defendants should have paid  
 20 taxes on the payments they received from the debtor would not  
 21 change the outcome as it would still leave the debtor, and hence  
 22 the trustee, subject to the in pari delicto defense.

23 A court will neither aid in the commission of a fraud  
 24 by enforcing a contract, nor relieve one of two parties  
 25 to a fraud from its consequences, where both are in  
 pari delicto. The doctrine closes the doors of a court  
 of equity to one tainted with inequitableness or bad

---

26  
 27 10. The trustee would also have trouble claiming he was  
 28 surprised by the defendants' arguments, as, with one exception  
 (Carolyn Allen in AP No. 12-2469), they included in pari delicto  
 in their answers as an affirmative defense.

1       faith relative to the matter in which he seeks relief,  
2       however improper may have been the behavior of the  
      defendant.

<sup>3</sup> Jacobs, 53 Cal. App. 4th at 699 (citations omitted).

4 For the reasons stated, the court concludes that the  
5 defendants have made a prima facie showing that the defense of in  
6 pari delicto applies, and the trustee has failed to show there is  
7 a genuine issue of material fact that should preclude summary  
8 adjudication of the issue. Accordingly, the court will grant  
9 summary judgment in favor of the defendants and against the  
10 trustee on the trustee's usury claims.<sup>11</sup>

**V. Summary Adjudication on Actual Fraudulent Transfer Claims  
(But Not Defenses Thereto)**

13 As discussed above, based on the debtor's guilty plea and  
14 plea agreement and the McHale declaration, the court finds there  
15 is conclusive evidence that the debtor was operating a Ponzi  
16 scheme. That evidence, in turn, "is sufficient to establish  
17 actual intent to defraud." Donell, 533 F.3d at 770; AFI Holding,  
18 525 F.3d at 704. In fact, that evidence "conclusively  
19 establishes the debtor's fraudulent intent under 11 U.S.C. §  
20 548(a)(1)(A) and California Civil Code § 3439.04(a)(1), and  
21 precludes relitigation of that issue." Slatkin, 525 F.3d at 814.

22 The court therefore will grant partial summary adjudication  
23 in favor of the trustee and against the defendants on the

25       11. The court is not dismissing the claims for failure to  
26 state a claim upon which relief can be granted, because the court  
27 has rejected the defendants' grounds for that relief  
(insufficiency of pleadings and judicial estoppel). Because the  
28 issue on which the court bases its ruling -- *in pari delicto* --  
depends on matters outside the pleadings, dismissal under Rule  
12(b) (6) is not appropriate. See Fed. R. Civ. P. 12(d),  
incorporated herein by Fed. R. Bankr. P. 7012(b).

1 trustee's claims for avoidance and recovery of actual fraudulent  
2 transfers under both § 548(a)(1)(A) of the Bankruptcy Code and  
3 Cal. Civ. Code § 3439.04(a)(1), to the extent of determining,  
4 pursuant to Fed. R. Civ. P. 7056(g), incorporated herein by Fed.  
5 R. Bankr. P. 7056, that Vincent Singh's operation of a Ponzi  
6 scheme with the requisite fraudulent intent is not genuinely in  
7 dispute and will be treated as established in these adversary  
8 proceedings.

9 The court recognizes that the defendants have not sought a  
10 ruling on the actual fraudulent transfer claims except to seek  
11 partial summary adjudication on the issue of what they refer to  
12 as the value component of their good faith defense. However,  
13 pursuant to Fed. R. Civ. P. 56(f), incorporated herein by Fed. R.  
14 Bankr. P. 7056, the court may, independent of the motion, grant  
15 summary judgment for a non-moving party or consider summary  
16 judgment on its own after identifying for the parties the issues  
17 it considers to be not genuinely in dispute. The rule requires  
18 the court to give notice to the parties and a reasonable time to  
19 respond. Here, the court's findings on the issue of Vincent  
20 Singh's operation of a Ponzi scheme and his actual intent to  
21 defraud are essential to the court's ruling on the in pari  
22 delicto defense to the trustee's usury claims. Thus, the court  
23 considers that the issues are fairly in play on this motion. To  
24 be clear, the court is making no findings about the defendants'  
25 defenses to the trustee's actual fraudulent transfer claims  
26 except, as discussed below, on the issue of whether the  
27 defendants took the transfers for value, for purposes of  
28 Bankruptcy Code § 548(c) and Civil Code § 3439.08(a).

VI. Motion to Dismiss / for Summary Judgment  
on Constructive Fraudulent Transfer Claims

With the above findings and conclusions concerning the trustee's actual fraudulent transfer claims, there appears to be no need for the trustee to pursue his constructive fraudulent transfer claims at this time, because both the evidentiary burden and the element of damages are more favorable to the trustee, in all respects, under the actual fraudulent transfer statutes.

9 Under those statutes, Bankruptcy Code § 548(a)(1)(A) and Civil  
10 Code § 3439.04(a)(1), the trustee is entitled to avoid and  
11 recover the full amount of the payments the debtor made to the  
12 defendants. To defeat the trustee's claims, it will be the  
13 defendants' burden to demonstrate they took their payments for  
14 value and in good faith, under Bankruptcy Code § 548(c) and  
15 Civil Code § 3439.08(a).<sup>12</sup> They will have to demonstrate their  
16 good faith under an objective standard. Jobin v. McKay (In re M  
17 & L Bus. Mach. Co.), 84 F.3d 1330, 1338 (10th Cir. 1996); In re  
18 Agricultural Research & Tech. Group, Inc., 916 F.2d 528, 535-36,  
19 539 (9th Cir. 1990). And if they meet that burden, they will be  
20 able to retain only the payments they received that total up to  
21 the amount they paid to the debtor. AFI Holding, 525 F.3d at  
22 709; see also Donell, 533 F.3d at 770; In re United Energy Corp.,  
23 944 F.2d 589, 595, n.6 (9th Cir. 1991).

24 // //

26       12. As discussed below, the court concludes that, as to the  
27       payments received up to the total amounts of their investments,  
28       the defendants have demonstrated they held restitution claims  
         against the debtor which were satisfied by the payments received,  
         and therefore, the defendants have satisfied the "for value"  
         component of that test.

1       In contrast, under the constructive fraudulent transfer  
 2 statutes, Bankruptcy Code § 548(a)(1)(B) and Civil Code §  
 3 3439.04(a)(2), the trustee would have to demonstrate, as part of  
 4 his case-in-chief, that the debtor received less than a  
 5 reasonably equivalent value in exchange for the transfers.<sup>13</sup> As  
 6 discussed below, as to the payments made to the defendants up to  
 7 the total amounts of their investments, the trustee will be  
 8 unable to make that showing. Thus, all that remains for the  
 9 trustee under his constructive fraudulent transfer claims is a  
 10 recovery to the extent he can demonstrate that particular  
 11 defendants received more than the totals of their investments.

12       As explained below, the court concludes that for purposes of  
 13 the trustee's constructive fraudulent transfer claims, the  
 14 trustee will be able to demonstrate the debtor received less than  
 15 reasonably equivalent value for the transfers to each particular  
 16 defendant only to the extent the defendant was a "net winner."  
 17 As for the payments received up to the full amount of the  
 18 defendant's investment, those payments were made in satisfaction  
 19 of the defendant's restitutions claims against Vincent Singh.

20  
 21       13. The Donell court described the distinctions as follows:  
 22       Under the actual fraud theory, the receiver may recover  
 23 the entire amount paid to the winning investor,  
including amounts which could be considered "return of  
 24 principal." However, there is a "good faith" defense  
 25 that permits an innocent winning investor to retain  
 26 funds up to the amount of the initial outlay. Under  
 27 the constructive fraud theory, the receiver may only  
 28 recover "profits" above the initial outlay, unless the  
 receiver can prove a lack of good faith, in which case  
 the receiver may also recover the amounts that could be  
 considered return of principal.

28       Donell, 533 F.3d at 771 (citations omitted).

1 "It is well-established that the innocent investor in a Ponzi  
2 scheme gives reasonably equivalent value to the debtor when he  
3 receives payments in satisfaction or partial satisfaction of his  
4 restitution claim against the debtor." Donell, 533 F.3d at 772;  
5 AFI Holding, 525 F.3d at 708; United Energy, 944 F.2d at 595.

6 In a suit for damages, the . . . payments given to the  
7 defrauded investors would be deemed to partially  
satisfy or release fraud or restitution claims.  
8 Satisfaction of such claims would constitute value  
given for the receipt of the . . . payments within the  
9 meaning of section 548(d)(2)(A) or the comparable  
California provision.

10 In re United Energy Corp., 102 B.R. 757, 763 (9th Cir. BAP 1989).

11 The trustee contends the defendants did not have or may not  
12 have had restitution claims against Vincent Singh because (1) the  
13 underlying contracts between them, as evidenced by the promissory  
14 notes, called for usurious interest, and thus, were illegal and  
15 unenforceable; and (2) the transactions were part of a conspiracy  
16 to evade taxes, and were illegal and unenforceable for that  
17 reason as well. Thus, the trustee claims, "he has presented  
18 evidence from which the Court can infer that [the defendants]  
19 were not innocent." Opp. at 35:3-4.

20 [T]he theoretical rescission/restitution claims that  
21 might otherwise form the basis for a "debt" that could  
be offset against the payments to the Moving Defendants  
22 simply are not available when they were the product of  
usurious transactions or a conspiracy to evade taxes.  
The net result will be that Plaintiff will be able to  
23 prove that the Moving Defendants did not receive  
reasonably equivalent value in exchange for the  
24 payments they received—because no legitimate,  
enforceable debt was paid by means of the payments to  
25 the Moving Defendants.

26 Id. at 25:15-21.

27 The court disagrees. The trustee has cited no authority,  
28 and the court has found none, for the proposition that either an

1 investor's knowledge that he would be receiving usurious interest  
 2 or his intention not to pay taxes legitimately owed on the  
 3 payments he receives on his investment takes the investor in a  
 4 Ponzi scheme outside the "innocent investor" category for  
 5 determining whether he was defrauded into making his investment.<sup>14</sup>  
 6 Instead, importantly, the restitution claims arose out of the  
 7 fact of the Ponzi scheme itself and the defendants' investments  
 8 in it -- they are claims a defrauded investor has against the  
 9 perpetrator, and they arise at the time the investor is defrauded  
 10 by the perpetrator; that is, at the time the investor makes his  
 11 investment.

12 Thus, in United Energy, the court found that "the investors  
 13 were duped into buying the solar modules. They clearly had  
 14 claims for rescission and restitution which arose when they  
 15 bought the modules." United Energy, 994 F.2d at 596. Relying on  
 16 United Energy, the AFI Holding court found that

17 the record demonstrates that Eisenberg's operation was  
 18 a Ponzi scheme before Mackenzie provided his principal  
 19 "investment," and thus well before the transfers were  
 20 made from AFI to Mackenzie. Because of this, Mackenzie  
 21 acquired a restitution claim at the time he bought into  
 22 Eisenberg's Ponzi scheme, just as the investors in  
 23 United Energy acquired a restitution claim at the time  
 24 they bought their solar modules.

25 AFI Holding, 525 F.3d at 708.

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26 14. In any event, as discussed above in connection with the  
 27 in pari delicto defense, the trustee has not presented sufficient  
 28 evidence for the court to infer the existence of either a  
 conspiracy or an intent to evade taxes legitimately owed. As for  
 the promissory notes calling for usurious interest, there is no  
 evidence they were prepared or their terms suggested by anyone  
 other than Vincent Singh. On the facts presented on these issues  
 in opposition to this summary judgment motion, the trustee has  
 not defeated the conclusion that the defendants were defrauded by  
 Vincent Singh into making their investments.

1       The cases make clear that restitution claims are, to use the  
2 trustee's word, "available" to every defendant who was defrauded  
3 into investing in a Ponzi scheme. In order to defeat a  
4 particular defendant's restitution claim, the trustee must show  
5 the defendant was not defrauded into investing; that is, the  
6 trustee must show the defendant knew about the Ponzi scheme at  
7 the time he made his investment. Thus, in United Energy, the  
8 court acknowledged that

9       [i]n recognizing these claims for rescission and  
10      restitution, we assume that the investors had no  
11      knowledge of the fraud the debtors were perpetrating.  
12      If investments were made with culpable knowledge, all  
13      subsequent payments made to such investors within one  
14      year of the debtors' bankruptcy would be avoidable  
15      under section 548(a)(2), regardless of the amount  
16      invested, because the debtors would not have exchanged  
17      a reasonably equivalent value for the payments.

18      944 F.2d at 596, n.7. Here, the trustee simply has not alleged  
19      in his complaints, and has not produced any evidence to  
20      demonstrate, that any of the defendants actually knew about  
21      Vincent Singh's fraudulent scheme and participated in it.

22      All the parties should keep in mind that, in the court's  
23      view, the test for determining whether one was an "innocent"  
24      investor, such that he acquired a restitution claim the payment  
25      of which constituted reasonably equivalent value given to the  
26      debtor in exchange for the payment, is entirely distinct from the  
27      test for determining whether an investor acted "in good faith"  
28      for purposes of the defendant's "for value and in good faith"  
      defense under Bankruptcy Code § 548(c) and Civil Code §  
      3439.08(a). The distinction is best described in Jobin, supra.  
      First, the court held that the appropriate standard for measuring  
      good faith, under § 548(c), is an objective standard (84 F.3d at

1 1338); that the defendant has the burden of proving good faith  
 2 (id.); and that, considering the facts,

3 it was not clearly erroneous for the bankruptcy court  
 4 to conclude that a reasonably prudent investor in Mr.  
 5 McKay's [the defendant's] position should have known of  
 6 M & L's [the debtor's] fraudulent intent and impending  
 7 insolvency and that he was therefore not entitled to  
 8 the good faith defense established by § 548(c).  
 9

10 Id. at 1338-39.

11 Based on those conclusions, the trustee in the case,  
 12 speaking with regard to the same conduct of the same defendant,  
 13 tried to equate good faith under § 548(c) with the reasonably  
 14 equivalent value element of her case-in-chief under §  
 15 548(a)(1)(B) (the constructive fraudulent transfer statute).  
 16 Thus, the trustee argued that "because Mr. McKay lacked good  
 17 faith, he did not have a colorable restitution claim against M &  
 18 L, and, as a result, M & L's payments to him did not provide M &  
 19 L with 'reasonably equivalent value' by reducing such a claim."  
 20 Jobin, 84 F.3d at 1341. The trustee claimed the same standard  
 21 should be used under both subsections, § 548(c) and §  
 22 548(a)(1)(B), and that because the court had used an objective  
 23 standard to defeat the defendant's good faith defense under §  
 24 548(c), an objective standard should also be used to defeat the  
 25 defendant's restitution claim for purposes of determining the  
 26 trustee's case-in-chief under § 548(a)(1)(B).

27 The court disagreed. First, the court observed that  
 28 "although § 548(c) uses the term 'good faith,' § 548(a)(2)  
 29 [(a)(1)(B)] does not. Instead, § 548(a)(2) [(a)(1)(B)] refers to  
 30 'value.'" Jobin, 84 F.3d at 1341. The court then framed the  
 31 question, for purposes of § 548(a)(1)(B) [reasonably equivalent

1 value for purposes of the trustee's case-in-chief], as "whether  
 2 an individual investor who should have known of a fraudulent  
 3 scheme but did not have actual knowledge has a colorable  
 4 restitution claim to recover his investment." Id. In other  
 5 words, the good faith test under § 548(c) is whether, under the  
 6 circumstances viewed objectively, the defendant should have known  
 7 of the fraudulent scheme, whereas the test under § 548(a)(1)(B)  
 8 is whether the defendant had actual knowledge of the scheme.<sup>15</sup>  
 9 Because the evidence showed the defendant "was fraudulently  
 10 induced to invest in M & L, [and] in light of the bankruptcy  
 11 court's factual finding that he did not have actual knowledge of  
 12 the fraud," the court concluded he had a restitution claim that  
 13 was reduced by the amounts of the payments he received from the  
 14 debtor, such that the debtor received reasonably equivalent value  
 15 for those payments. Id. at 1342.

16 Given (1) the conclusive evidence that Vincent Singh was  
 17 operating a Ponzi scheme, (2) the trustee's position that "all  
 18 payments from and to investors . . . which were for 'investment'  
 19

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20 15. The Jobin court itself did not use the word  
 21 "subjective" or the term "good faith" when analyzing the  
 22 "reasonably equivalent value" question under § 548(a)(1)(B),  
 23 although the trustee had tried to frame the question as a contest  
 24 between "two standards of good faith--an objective one under §  
 25 548(c) and a subjective one under § 548(a)(2) [(a)(1)(B)]." 84  
 26 F.3d at 1341. In this court's view, use of the term "good faith"  
 27 when referring to the trustee's burden of proving "less than  
 28 reasonably equivalent value" under § 548(a)(1)(B) improperly  
 creates considerable confusion. Similarly, reference to a  
 "subjective" test tends to suggest the question is one of good  
 faith when it is not. For purposes of determining whether the  
 defendant in a Ponzi scheme case had a restitution claim, the  
 satisfaction of which qualified as "reasonably equivalent value"  
 under § 548(a)(1)(B), the question is simply whether he had  
 actual knowledge of the scheme at the time he invested in it.

1 purposes were payments in furtherance of the Ponzi scheme" 2 (McHale Decl., at 2:23-26), and (3) the trustee's failure to 3 submit any evidence that any defendant had actual knowledge of 4 the fraudulent scheme, the court concludes that the defendants 5 acquired restitution claims against Vincent Singh at the time 6 they made their investments, that those claims were 7 proportionately reduced by the payments they received from him, 8 and that the satisfaction of their claims for restitution 9 constituted reasonably equivalent value for the payments they 10 received. The trustee has failed to demonstrate that a genuine 11 issue of fact as to any of these findings and conclusions remains 12 to be tried.

13 As the defendants note, the Ninth Circuit has 14 [found] no reason, in statute or case law, to treat 15 "reasonably equivalent value" differently for each of 16 the Code's provisions. Both the *prima facie* case for 17 constructively fraudulent transfers, under § 3439.04(a)(2), and the affirmative defense to actually 18 fraudulent transfers, under § 3439.08, require a determination of whether "reasonably equivalent value" was transferred from the transferee to the debtor.

19 AFI Holding, 525 F.3d at 707. Thus, this ruling determines the 20 issue for both purposes, and the trustee will only be successful 21 in recovering against "net winners."

## 22 **VII. Remaining Issues**

23 Finally, the defendants contend the trustee's complaints 24 fail to state a claim upon which relief can be granted because 25 "they do not identify even one dollar that was allegedly received 26 by an investor in excess of the amount of their principal 27 investment." Mot. at 26:18-19. In other words, the trustee 28 failed to identify defendants who were "net winners" and to state

1 by how much they were net winners. The court does not agree that  
2 the trustee was required to be that specific in the complaints.  
3 Instead, the court finds sufficient for pleading purposes the  
4 trustee's allegation that the debtor received less than a  
5 reasonably equivalent value in exchange for the payments, and the  
6 motion to dismiss the constructive fraudulent transfer claims  
7 will be denied. The trustee will have the opportunity later to  
8 demonstrate, if he can, that particular defendants were "net  
9 winners," and thus, under the Donell line of cases, that to the  
10 extent the payments they received from Vincent Singh exceeded the  
11 total of their investments, they did not give reasonably  
12 equivalent value in exchange for those payments.

13 Although the court concludes the defendants gave reasonably  
14 equivalent value for the payments they received from the debtor,  
15 up to the total amount of their investments, this ruling leaves  
16 undecided the issue of whether the defendants received the  
17 payments from the debtor in good faith, so as to have a defense  
18 to the trustee's fraudulent transfer claims based on actual  
19 fraud; that is, the trustee's claims brought under Bankruptcy  
20 Code § 548(a)(1)(A) or Civil Code § 3439.04(a)(1). The  
21 defendants have indicated they will raise this contention at  
22 trial or by separate motion; it is not a part of their present  
23 motion.

24 As for the trustee's claims based on constructive fraud;  
25 that is, his claims under Bankruptcy Code § 548(a)(1)(B) or Civil  
26 Code § 3439.04(a)(2), the court will have no need to reach the  
27 issue of the defendants' good faith. As to the payments received  
28 by the defendants up to the total amounts of their investments,

1 as explained above, the court has already found the defendants  
 2 had valid restitution claims that were satisfied, in whole or in  
 3 part, by those payments. Thus, the trustee will be unable to  
 4 demonstrate that Vincent Singh received less than a reasonably  
 5 equivalent value in exchange for the payments.<sup>16</sup> That is, the  
 6 trustee will be unable to prevail on his case-in-chief, and the  
 7 court will have no need ever to reach the defendants' defenses.

8 As to the payments received by the defendants over and above  
 9 the total amounts of their investments, those payments were not  
 10 made in satisfaction of a restitution claim, that claim having  
 11 already been satisfied; thus, the defendants did not take those  
 12 payments "for value." As the test under Bankruptcy Code § 548(c)  
 13 and Civil Code § 3439.08(a) is a two-part test -- the defendant  
 14 must have taken the transfers "for value and in good faith" --  
 15 the defendants will be unable to satisfy the "for value"  
 16 component; thus, there will be no need for the court to reach the  
 17 good faith component of the defense.

18 Finally, the court wishes to clarify that certain documents  
 19 filed by the parties were not overlooked. First, the court has  
 20 paid virtually no heed to the defendants' statement of undisputed  
 21 facts and conclusions of law or the trustee's response to it  
 22 because the statement is essentially an itemization of the  
 23 procedural history of the adversary proceedings, along with a  
 24 restatement of some of the defendants' arguments; it is not a  
 25

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26 16. "Up to the amount that 'profit' payments return the  
 27 innocent investor's initial outlay, these payments are  
 28 settlements against the defrauded investor's restitution claim.  
 Up to this amount, therefore, there is an exchange of 'reasonably  
 equivalent value' for the defrauded investor's outlay." Donell,  
 533 F.3d at 777.

1 statement of material factual issues remaining in dispute.

2 Second, the court has reviewed the trustee's sur-reply and  
3 agrees that the defendants have taken out of context his  
4 statement that "Moving Defendants gave additional money to  
5 Vincent Singh after receiving amounts that were less than what  
6 they had previously invested." Opp. at 26:11-13. The court  
7 concludes the trustee has not admitted the defendants were "net  
8 losers." The defendants have offered no evidence on this issue,  
9 and it remains a disputed material factual issue.

10 Finally, the defendants have made blanket evidentiary  
11 objections to the supporting declaration of the trustee's  
12 attorney and to virtually all the exhibits submitted by the  
13 trustee. The court has given little weight to those documents in  
14 this decision, finding them to be of little persuasive value;  
15 thus, the court finds no reason to take the time to rule on the  
16 evidentiary objections, which are conclusory in any event.

17 **VIII. Conclusion**

18 To conclude, the court will grant the following relief:

19 (1) The court will grant summary judgment in favor of the  
20 defendants and against the trustee on the trustee's usury claims;

21 (2) The court will grant partial summary adjudication in  
22 favor of the trustee and against the defendants on the trustee's  
23 claims for avoidance and recovery of actual fraudulent transfers  
24 under both § 548(a)(1)(A) of the Bankruptcy Code and Cal. Civ.  
25 Code § 3439.04(a)(1), to the extent of determining, pursuant to  
26 Fed. R. Civ. P. 7056(g), incorporated herein by Fed. R. Bankr. P.  
27 7056, that Vincent Singh's operation of a Ponzi scheme with the  
28 requisite fraudulent intent is not genuinely in dispute and will

1 be treated as established in these adversary proceedings;

2       (3) The court will grant partial summary adjudication in  
3 favor of the defendants and against the trustee on the trustee's  
4 claims for avoidance and recovery of constructive fraudulent  
5 transfers under both § 548(a)(1)(B) of the Bankruptcy Code and  
6 Cal. Civ. Code § 3439.04(a)(2), to the extent of determining,  
7 pursuant to Fed. R. Civ. P. 7056(g), incorporated herein by Fed.  
8 R. Bankr. P. 7056, that the following facts are not genuinely in  
9 dispute and will be treated as established in these adversary  
10 proceedings: that the defendants acquired restitution claims  
11 against Vincent Singh at the time they made their investments;  
12 that those claims were proportionately reduced by the payments  
13 they received from him; and that the satisfaction of their claims  
14 for restitution constituted reasonably equivalent value for the  
15 payments they received, up to the total amount of their  
16 investments with Vincent Singh; and

17       (4) The court will grant partial summary adjudication in  
18 favor of the defendants and against the trustee on the  
19 defendants' defenses under Bankruptcy Code § 548(c) and Civil  
20 Code § 3439.08(a) to the trustee's claims for avoidance and  
21 recovery of actual fraudulent transfers under Bankruptcy Code §  
22 548(a)(1)(A) and Civil Code § 3439.04(a)(1), to the extent of  
23 determining, pursuant to Fed. R. Civ. P. 7056(g), incorporated  
24 herein by Fed. R. Bankr. P. 7056, that the following facts are  
25 not genuinely in dispute and will be treated as established in  
26 these adversary proceedings: that the defendants acquired  
27 restitution claims against Vincent Singh at the time they made  
28 their investments; that those claims were proportionately reduced

1 by the payments they received from him; and that the satisfaction  
2 of their claims for restitution constituted reasonably equivalent  
3 value for the payments they received, up to the total amount of  
4 their investments with Vincent Singh.

5 Except to the extent expressly set forth above, the motion  
6 is denied. The court will issue an order and partial judgment.

7 Dated: April 22, 2015

*Robert Bardwil*

8 ROBERT S. BARDWIL  
9 United States Bankruptcy Judge

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